

Docket No: 01-0662
Bench Date: 12/17/02
Deadline: N/A

MEMORANDUM

TO: The Commission

FROM: Eve Moran, Administrative Law Judge

DATE: December 16, 2002

SUBJECT: Illinois Commerce Commission
On Its Own Motion

Investigation concerning Illinois Bell Telephone Company's compliance with Section 271 of the Telecommunications Act of 1996.

RECOMMENDATION: Grant of Authority.

This memorandum bring to the Commission the ALJ's Request for Authority to Allow for the Exercise of Discretion in Setting Schedule and Process for Phase II of the Investigative Proceeding in Docket 01-0662 (Section 271 Compliance). This request is made necessary by a recently filed motion by Ameritech Illinois and the limitations, either real or perceived, that flow out of the Initiating Order for this investigative proceeding. Initiating Order, Docket 01-0662 (October 24, 2002).

The Ameritech Motion.

On November 21, 2002, Ameritech Illinois filed a Motion To Establish Procedural Schedule for Phase II. The primary task for Phase II, the Company asserts, is to review the BearingPoint OSS test reports prepared for the Commission at its request. Further, there is to be reviewed the E&Y report and three months of performance data. Ameritech Illinois proposes dispensing with formal hearings and cross-examination as indicated for contested matters. Instead, it suggests that the Commission explore the use of a process that would involve a two-day open session and a series of written comments by all interested parties. Ameritech Illinois notes that state commissions in Michigan, Wisconsin, Ohio and Indiana have all decided to conduct their respective 271 proceedings without formal hearings and cross-examination.

The CLEC Responses.

AT&T and WorldCom contend that the Ameritech Illinois' proposal would change the procedure that was employed in Phase I and thus would conflict with the direction set out in the Initiating Order for the instant proceeding. Irrespective of how other states

are handling their Section 271 proceedings, AT&T and WorldCom maintain that this Commission should continue with a contested case schedule for Phase II.

Another group of CLECs also contend that the Commission should retain a contested case procedure for Phase II given that the scope of issues to be addressed therein may go beyond what Ameritech Illinois has described. While these CLECs do not deny that the state agencies in Michigan, Wisconsin and Ohio have not held formal hearings to date, there still remains, in their view, the possibility that such a process could be engaged in those other jurisdictions.

McCleodUSA and TDS Metrocom believe that establishing a schedule for Phase II is premature at this time. Until the OSS reports, data and affidavits are provided, it is difficult for these CLECs to determine whether a traditional hearing process or a less formal process is more appropriate.

The Staff Response.

Staff believes that it is premature to set a procedural schedule for Phase II. A Phase I Order has not been entered by the Commission as yet, Staff comments, and neither has BearingPoint issued its OSS reports at this time.

Staff argues that Phase II should proceed in an expeditious manner, but, at the same time, function in a way to ensure the ability of all parties to address their issues. While Staff agrees that this Commission has substantial latitude in deciding how it would inform itself for purposes of consulting with the FCC, it points to the language in the Initiating Order that indicates the use of “evidentiary hearings” and sets out its support for this process. The scope of Phase II, Staff suggests, may include issues that Al’s proposal does not address.

The Ameritech Illinois Reply.

Phase II can be completed far more expeditiously than Phase I, Al maintains, by use of a different process that would still allow all parties the opportunity to present their views to the Commission. Ameritech points out that the instant proceeding is not a contested case such as would require a formal hearing under Section 10-25 of the Illinois Administrative Procedure Act. No party, it notes, disputes this premise.

While the Initiating Order does state that the Commission will hold evidentiary hearings, Al further observes that there is nothing in the order to specifically preclude other means by which to develop a comprehensive factual record in the matter. So too, Al notes, the Commission is certainly free to clarify or modify its Initiating Order so as to conduct the remainder of this proceeding in a manner it deems most appropriate.

Request and Recommendation

To be sure, the Initiating Order (issued back in October 24, 2001), found it appropriate to hold “evidentiary hearings” in the matter of this investigation. The ALJ made certain that the parties complied with a strict reading of this directive with respect

to Phase I of this proceeding, meaning that, several rounds of testimony was filed, cross-examination was taken, briefs were submitted, and a Proposed Order (allowing for exceptions and replies) was issued.

Most, if not all of the objections to Ameritech's proposal to change the process for Phase II center on the Initiating Order's language that the Commission will hold "evidentiary hearings." In other words, the arguments do not assert that the formal hearing process is better for present purposes, just that it is required.

To the extent that the Initiating Order contemplates just such a formal hearing process for all phases, it hampers the ALJ from exercising sound discretion in dealing with the motion and the situation at hand. It may be too soon to set a definitive schedule and process for the issues of Phase II. Nevertheless, it is not too early for the Commission to relieve the ALJ from the constraints suggested by the Initiating Order and to allow for the exercise of reasoned judgment in setting out a process other than that used for contested cases.

Under the law, this Commission, just like its counterparts in other states, has the flexibility to structure procedures for its Section 271 investigation outside of the formal requirements used in contested cases. Clearly the matter at hand is not a contested case but an investigation aimed at assessing all relevant information for the sole purposes of consulting with the FCC on Ameritech Illinois' expected application for Section 271 authority. So too, this Commission has not considered the arguments against or in favor of the use of traditional contested case procedures in an open forum. At best, it made a determination early in time "to hold evidentiary hearings and develop a comprehensive factual record" in order to properly discharge its role as consultant to the FCC. Initiating Order at 3. The latter part of this statement (which remains true to this date), i.e., "to develop a comprehensive record," however, does not necessarily or solely depend on the tactic of holding evidentiary hearings.

The ALJ is not asking the Commission to rule on the Ameritech Illinois pleading which is only briefly outlined in this writing. She is asking that the Commission, by vote on December 19, 2002, grant her the authority to address the concerns of the motion and the responses thereto in a meaningful and reasoned way.

It should be noted, that the parties are able to seek interlocutory review if they are dissatisfied with a ruling establishing a schedule or a process. The ALJ seeks, at the outset, the authority to freely make such ruling.

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